U.S. Department of Labor

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Issue Date: 10 May 2006

In the Matter of:

WILLIAM R. DUKE,
Claimant,

CASE NO: 2004 BLA 6025

v.

COWIN & COMPANY, INC.,
Employer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

Appearances:

Patrick Nakamura, Esquire
For the Claimant

Mary Lou Smith, Esquire
For the Employer

Thomas A. Grooms, Esquire
For the Director, OWCP

Before: Edward Terhune Miller,
Administrative Law Judge

DECISION AND ORDER – AWARD OF BENEFITS

Statement of Case

This proceeding involves an initial claim for benefits under the Black Lung Benefits Act (Act) as amended, 30 U.S.C. §§ 901 *et seq*. Claimant filed his claim after January 19, 2001. The

claim is therefore governed by 20 C.F.R. Part 718 (2004).[1] Because Claimant last worked in Alabama, the claim is subject to the law of the United States Court of Appeals for the Eleventh Circuit. *Shupe v. Director*, *OWCP*, 12 BLR 1-202 (1989) (en banc).

Procedural History

Claimant, William.Duke, filed his claim for benefits on April 15, 2002. (D-2). The District Director for the Department of Labor (DOL) awarded benefits in a Proposed Decision and Order dated October 29, 2003. (D-29). The District Director designated Cowin & Company (Employer) as the Responsible Operator liable for the payment of any black lung benefits. *Id.*

The Director sent notice of its designation as the Responsible Operator to Employer on October 10, 2002. (D-19). Following the District Director's award of benefits, Employer filed a timely request for a formal hearing, which was conducted on November17, 2004 in Birmingham, Alabama. Claimant was represented by counsel at the hearing. Employer appeared by counsel. (Tr. 5-6)

Issues

The issues in this case are:

1. Whether the claim was timely filed;
2. Whether Claimant was a miner within the meaning of the Act;
3. The length of Claimant's coal mine employment;
4. Whether the named employer is the Responsible Operator;
5. Whether Claimant has pneumoconiosis.
6. Whether Claimant's pneumoconiosis, if proved, was caused by his coal mining employment.
7. Whether Claimant has proved that he is totally disabled.
8. Whether such disability, if proved, was caused by Claimant's pneumoconiosis.

Based upon an appropriate analysis of the entire record in this case, all relevant evidence, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

Claimant was born on March 29, 1949. (D-2). He was previously married, but is not obligated to support his former spouse and does not have any children who are under 18 or dependent. (D-2). Claimant worked for the Respondent Employer from 1992 to 1993 doing

[1] All references to the Code of Federal Regulations are by part or section under Title 20 unless otherwise indicated. Claimant's exhibits are denoted "C-"; Employer's, "E-"; and the Director's, "D-"; references to the transcript of hearing are denoted "Tr."

construction work building a new coal mine at Shoal Creek, Alabama. (D-3, 7, Tr. 47-48). Claimant's work involved varied heavy manual labor, and coal dust exposure. (Tr. 66-67). Claimant testified that he started smoking cigarettes around the age of 18 and was a regular smoker at the rate of 1 ½ to 2 packs per day until he quit in 2000. (Tr. 72).

Claimant tetified that he has trouble breathing and has problems just going to the mailbox and back. He testified that he could not do his previous work because he could not even walk in and out of the slope where he worked. At the time of the hearing, he was seeing Dr. Hawkins for his breathing problems and he was taking various medications to help his breathing. (Tr. 70).

Timeliness

Under § 725.308(a), a claim of a living miner is timely filed if it is filed "within three years after a medical determination of total disability due to pneumoconiosis" has been communicated to the miner. Section 725.308(c) creates a rebuttable presumption that every claim for benefits is timely filed. This statute of limitations does not begin to run until a miner is actually diagnosed by a doctor, regardless of whether the miner believes he has the disease earlier. *Tennessee Consolidated Coal Company v. Kirk*, 264 F.3d 602 (6th Cir. 2001). As no evidence has been presented to rebut the presumption that this claim was untimely, I find that the claim was timely filed.

Responsible Operator & Miner

Claimant testified that his first coal mine related work was with Mine Services Inc, where he worked with Drummonds Coal Company. He explained that Mine Services built the big drag lines that would mine the coal in the coal mine. He worked as a crane operator, front-end loader operator, a welder and ironworker and was called on to do repair work. He testified that his duties were in the mines themselves and most of the time in his job he was at the mines and was exposed to coal dust while performing his duties. His repair work involved working on equipment that was defective or inoperative and while doing repairs, coal was being produced and mined. Most of this work was at surface mines, but he also remembered working at an underground mine for approximately three weeks while employed for Mine Services. Claimant's Social Security records show employment with Mine Services from 1977 to 1982. (D-7).

Claimant testified that he next worked for Bishop Machinery Erectors, where he "cut-down" used equipment in the mines and moved it to another mine and put the equipment together. He stated that the work was similar to the work he did at Mine Services and the machinery and drag lines were covered in dust. Claimant testified that he worked on a machine that was similar to a large building that walks around, and he was exposed to coal dust and as he worked on some of the rooms within the machine, the rooms were filled with dust. Claimant earned $4460.45 with Bishop in 1985. (D-7)

Next, Claimant testified that he worked for Bishop Specialized Erection which was essentially the same company with the same bosses, but had a different name. He worked with this company cutting down a shovel. He described the work as similar to cutting down the drag

line, but described cutting down the shovel as a "lot harder" and a "lot nastier" because it was on top of the coal and not on tracks. He stated that he was exposed to coal dust doing this work and the coal was all over because he was in the mine itself where the coal was being produced. While working for Bishop Specialized, he also worked on a site cutting down a drag line, similar to his work with Bishop Machinery. This job exposed him to coal dust as the air lines he used to blow down the room where they were working caused the coal particles to be airborne. He testified that there was coal mining going on at the site while he was working. Claimant earned $14,885.10 in 1985 and $2,633.29 in 1986.

In 1992, Claimant worked for ProMac at U.S. Steel Coal Mining in Alabama, where he worked replacing equipment in washers. He stated that the work was similar to what he performed at Mine Services and that he was exposed to dust while he was working. He stated that the mine was operating at the time, and the exposure was so bad that he couldn't even see his hand in front of his face. Claimant earned $1845.10 with ProMac in 1992. Claimant also worked in 1992 for Industrial Construction Services replacing a hopper in a coal washer at the U.S. Steel Mine. His Social Security records show $359.95 earned with Industrial in 1992.

Claimant testified that in 1992 he began working for Cowin and Company as a miner driller building a new underground coal mine in Shoal, Alabama. Cowin and Company was responsible for sinking a twenty-two foot shaft and building the slope, which is the entry into the mine where the coal comes out on a conveyor belt. For over a year, he worked at retaining the roof of the slope by going through the coal seams and pinning wire, replacing pumps, putting down railroad tracks. He described pinning as taking a jack leg and a four foot drill and drilling up into the ceiling and replacing it with a pin to hold up the roof so it would not cave in. This work involved drilling into the coal and Claimant stated the dust was "pitiful" when they hit a coal seam. He stated that when they were working in the mine, coal was being retracted. After about a year, he performed work at the gunnite pot. He described gunnite as cement and sand and fibers and explained that it is used for cementing the roof in the mine and the slope and that he did this job for about three months. During this time, he worked on the surface in a shed, but occasionally, once or twice a month, when no gunnite was needed, he worked on the slope, doing whatever job was needed. He stated that he was exposed to coal dust during this job from the wind blowing coal from a big coal pile extracted from the mine and coal dust was over everything. He then worked as an ironworker welder for about two or three months, installing I-beams for the elevator. He stated that he was actually in the mine while working and was exposed to dust coming up from the mine itself through the shaft.

Claimant left Cowin in 1994 when he was laid off due to lack of work, but worked for the company again for small projects in 1994 and 1995 that took one to two weeks. (D-5). Claimant estimated that he worked as a welder with Cowin for about three months and as a gunnite operator for about three months. Most of the work he did with the company was on the slope and he described it as heavy work. He was required to carry 50 to 60 pound rails, and do heavy lifting replacing the pumps. He stated that he was exposed to coal dust the entire time he was working on the slope.

An employment summary from Cowin shows that Claimant was employed with the company for several jobs lasting a week or two in 1994 and 1995. It also states that Claimant was employed

with Cowin from October 16, 1992 until January 31, 1994 at the Shoal Creek mine in Alabama. The Social Security records show earnings in 1992, 1993, 1994 and 1995 with Cowin. (D-7).

John Moore testified at the hearing that he has been employed by Cowin since 1987. He has worked for the last five years as Vice President of Safety in Human Resources. He described Cowin as a construction company with a specialty in underground construction, and estimated that about 70% of their business was at coal mine sites. He testified that Cowin does not own, and as far as he knew has never owned a coal mine. He stated that he is familiar with the project that the company worked for Drummond Coal and that he was present at the site. He indicated that he worked as an on-job safety inspector, did payroll, labor relations and helped the engineers. He described the job as constructing a slope, which was approximately eighteen feet high and twenty feet wide, about 4200 feet long, which is a tunnel that goes down from the surface to the coal seams on a sixteen degree angle. The company also constructed an elevator shaft which was 26 feet in diameter and 1100 feet deep vertical. He remembered Claimant working for the company and that he was good at going and getting things for workers. He also remembered that Claimant worked at the gunnite operation. He stated that he went into the slope and there was no dust problem because it was well-ventilated with fans and that water coming from the ground and roof kept the dust down. He also testified that he did not remember that the coal pile described by Claimant was a big dust problem because they compacted it and kept water on it. During the time Cowin was building the mine, they mined approximately 650,000 tons of coal. He thought that Claimant worked longer than described at the gunnite operation, but could not give an exact time. He estimated it was hard to say, but more like six to nine months. Finally, he stated that there was not a dust problem building the elevator because the shaft was on intake air, so that fresh air was circulating. He stated that Cowin is owned by C & C Holding Company, which is owned by the Cowin family, including his father-in-law, John Cowin, although he personally does not have any ownership in the company.

After leaving Cowin, Claimant worked for Triangle Construction in 1994 and 1995, again at the U.S. Steel mine, working underground, replacing conveyor belts and that he was exposed to dust during this job. He earned $1010.48 in 1994 and $2978.38 in 1995. Claimant testified that he next employed by Industrial Contracting at Fairmont. He worked at the U.S. Steel mine, replacing equipment and stated that it was similar to his previous work. In 1995 he earned $1267.42 with Industrial.

Claimant's final coal related employment was with in 1998 and 1999 with C.C.C. Group at the Seagram mine in Alabama, which was owned by Drummonds. He worked tearing down a drag line and stated that it was similar to the previous work he had done on the drag line. He stated that he was exposed to coal dust while doing this work. He stated that the mine he was working on was not operating, but the mine about a half mile away was operating while he worked. He earned $1198.08 in 1998 and $11,929.23 in 1999.

The Act defines a "miner" as "any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility." §725.202(b). A "miner" includes an individual who works or

has worked in coal mine construction in or around a coal mine, to the extent such individual was exposed to coal mine dust as a result of such employment. §725.101(a)(19).

The Act contains special provisions which address coal mine construction workers. §725.202(b). This provision states that a "coal mine construction or transportation worker shall be considered a miner to the extent such individual is or was exposed to coal mine dust as a result of employment in or around a coal mine or coal preparation facility." Specifically, the Act provides that a "construction worker shall be considered a miner to the extent that his or her work is integral to the building of a coal or underground mine." Further, there is a rebuttable presumption that a construction worker was exposed to coal dust during all periods of employment in and around a coal mine or coal preparation facility. §725.202(b)(1). The presumption may be rebutted by evidence which demonstrates that the individual was not regularly exposed to coal mine dust during his or her work in or around a coal mine or coal preparation facility or that the individual did not work regularly in or around a coal mine or coal preparation facility. §725.202(b)(2)(i), (ii).

In addition, a coal mine does not have to be operational for construction work to be considered as mining under the Act. The regulations define a coal mine as "an area of land and all structures, facilities…and other property…placed upon, under or above the surface of such land…used in, *or to be used in*…[the extraction of coal]." §725.101(a)(12) (emphasis added). Moreover, in promulgating the amended regulations, the Department of Labor stated that the fact that a claimant worked at non-operational mines is not, by itself, sufficient to establish a lack of coal mine dust exposure. 65 Fed. Reg. 79961 (Dec. 20, 2000).

The evidence establishes that Claimant was a "miner" within the meaning of the Act, becauseClaimant described in detail the various jobs that he worked doing construction at coal mines. As a coal mine construction worker, Claimant is entitled to the rebuttable presumption that he was a miner. Although the Employer presented John Moore's testimony that there was very little dust involved in the construction projects, I find the Claimant's testimony on this issue was more credible. Claimant testified in detail about the various jobs he engaged in at the coal mine construction projects, and the resulting dust exposure from his duties. He indicated that he was continually exposed to coal dust as a part of all the duties he performed, including work as a gunnite operator and welder. The employer presented a more general assertion that there was not a dust problem because the project was well ventilated and watered. I find the Employer has failed to rebut the presumption that Claimant was a miner within the meaning of the Act.

The regulations provide that the properly designated potential responsible operator which is the most recent employer of a miner for a cumulative period of not less than one year shall be the responsible operator. §725.493(a)(1) (2000). Claimant's employment summary with Cowin states that he was employed from October 16, 1992 to January 31, 1994 at the Shoal Creek mine. The evidence shows that after his employment with Cowin, Claimant was employed with Triangle Construction, Industrial Contracting and C.C.C. Group. However, none of these periods of employment amounted to a full year of work. Accordingly, as the Employer was the most recent employer for which Claimant worked as a miner for a period of one year, I find Cowin and Company is properly named as the responsible operator in this claim.

Length of Coal Mine Employment

The determination of length of coal mine employment must begin with § 725.101(a)(32)(ii), which directs an adjudication officer to ascertain the beginning and ending dates of coal mine employment by using any credible evidence. There are several permissible sources of credible evidence. First, an administrative law judge may rely solely upon a coal mine employment history form completed by the miner. See *Harkey v. Alabama-By-Products Corp.*, 7 B.L.R. 1-26 (1984). A miner's uncontradicted and credible testimony may also be the exclusive basis for a finding on the length of miner's coal mine employment. See *Bizarri v. Consolidation Coal Co*., 7 B.L.R. 1-343 (1984); *Coval v. Pike Coal Co*., 7 B.L.R. 1-272 (1984). If the miner's testimony is unreliable, it is permissible for an administrative law judge to credit Social Security records over the miner's testimony. See *Tackett v. Director*, OWCP, 6 B.L.R. 1-839 (1984).

In his application for benefits, Claimant alleged that he worked in coal mine employment from 1977 to 1999. The record contains Claimant's reported coal mine history, W-2 forms, Social Security records, and Claimant's testimony at the hearing. (D 3, 4, 5, 7). When considered in conjunction with Claimant's testimony at the hearing regarding the type of work he did for various employers, the Social Security Earnings report reflects the following coal mine employment earnings history:

Year	Earnings	Industry Average for 125 days of CM	Years of Coal Mine Employment
1977	$ 14,685.74	$ 8,987.50	1.00
1978	$ 16,183.66	$10,038.75	1.00
1979	$ 22,900.00	$10,878.75	1.00
1980	$ 25,900.00	$10.927.50	1.00
1981	$ 22,438.29	$12,100.00	1.00
1982	$ 15,008.46	$12,698.75	1.00
1985	$ 19,345.55	$15,250.00	1.00
1986	$ 2,633.29	$15,390.00	.17
1992	$ 8,494.26	$17,200.00	.49
1993	$28,714.46	$17,260.00	1.00
1994	$ 6,166.48	$17760.00	.35
1995	$ 7,322.82	$18,440.00	.40
1998	$ 1,198.08	$19,160.00	.06
1999	$11,929.23	$19,340.00	.62
		Total:	10.09 years

Accordingly, I find that Claimant was employed for 10.09 years of qualifying coal mine employment.

Admissibility of Evidence Under Pertinent Regulations

The Director offered Dr. Ballard's x-ray interpretation, and Dr. Hawkins' pulmonary function studies, arterial blood gas studies, and medical report, all dated July 3, 2002, as Director's Exhibit 10. That evidence is admissible as evidence generated by the mandatory pulmonary examination provided to Claimant of right under the applicable regulations. § 725.406.

Claimant identified an x-ray interpretation by Dr. Ahmed of the film dated July 3, 2002, and an interpretation of Dr. Cappiello of the film dated October 17, 2002, which are admissible as initial evidence under § 725.414(a)(2)(i). (C-1, 4).

Employer identified x-ray interpretations by Dr. Scott and Dr. Wheeler of a film dated October 17, 2002, a resting arterial blood gas study dated October 15, 2003, and a medical report by Dr. Bradley dated September 24, 2003, as initial evidence, which is admissible as such under § 725.414(a)(3)(i). (E-1, 2, 10, 11, 12).

In addition, Employer identified an x-ray interpretation by Dr. Wheeler of the film dated July 3, 2002, as rebuttal of the interpretation of that film by Dr. Ballard, which is admissible as such under § 725.414(s)(3)(ii). (D-10; E-3). In an order issued January 24, 2006 additional medical evidence submitted by the employer was excluded as it was in excess of the evidentiary limitations. (E-5, 6, 8, 9).

Medical Evidence

Chest X-Ray Evidence

Ex. No.	Physician	B-Reader /BCR[2]	Date of X-ray	Film Quality	Reading
D-10	Goldstein	B	7-3-02	3	Quality only
D-10	Ballard	B, BCR	7-3-02	2	1/0; s/t
E-4	Scott	BCR, B	7-3-02	2	No pneumoconiosis
E-3	Wheeler	BCR, B	7-3-02	1	No pneumoconiosis
C-1	Ahmed	BCR, B	7-3-02	2	1/0
C-4	Cappiello	BCR, B	10-17-02	3	1/0
E-11	Wheeler	BCR, B	10-17-02	1	No pneumoconiosis
E-12	Scott	BCR, B	10-17-02	1	No pneumoconiosis

[2] "BCR" refers to a board-certified radiologist. "B" refers to a NIOSH-certified B-reader. B-reader qualifications are recorded on the B-reader list published on DOL's website, *List of Approved B-Readers* at *http://www.oalj.dol.gov/public/blalung/refrnc/bread3.htm*. The board-certifications of physicians are listed by the American Board of Medical Specialties at *www.abms.org*. This tribunal has taken judicial notice of these resources if the qualifications of particular physicians are not otherwise of record. *See Maddaleni v. Pittsburg and Midway Coal Co.*, 14 BLR 1-135 (1990).

Pulmonary Function Tests[3]

Ex. No.	Doctor	Date of Study	Age	Ht.[4]	Conf.	Qual.	FEV_1	FVC	MVV	FEV1/ FVC	Coop./ Comp.
D-10	Hawkins	7-3-02	53	69"	Yes	Yes	1.14	3.01	40	79%	Good

Blood Gas Studies

Ex. No.	Physician	Date of Study	Qual.	Altitude	Rest(R) Exer.(E)	PCO_2	PO_2
D-10	Hawkins	7-3-02	No	0-2999	R	38	78
E-2	Bradley	10-15-03	No	0-2999	R	36	70
			No		E	38	87

Physician's Opinions

Dr. Hawkins

Dr. Jeffery Hawkins, who is board-certified in internal medicine and the subspecialty of pulmonary disease, examined Claimant for coal workers' pneumoconiosis on behalf of DOL and issued a report on July 3, 2002. (D-10). He noted social, medical and employment histories, the latter involving a review of the employment forms filed in this claim. He noted a smoking history that began at age 17 at the rate of 2 packs per day, ending a week before the date of the examination. Claimant indicated complaints of sputum production, wheezing, dyspnea and chest pain. The physician noted that the chest examination revealed auscultation was reduced and expiratory wheezing and a few rhonchi present. Dr. Hawkins indicated that an x-ray taken on the date of examination was consistent with pneumoconiosis, that a pulmonary function study showed severe airflow obstruction and an arterial blood gas study evidenced an adequate resting and exertional gas exchange. Dr. Hawkin's pulmonary function study was found acceptable by Dr. Michos, who reviewed the tracings on behalf of DOL.

Dr. Hawkins diagnosed chronic obstructive pulmonary disease (COPD), based on exertional dyspnea, clinical examination, wheezing, cigarette smoking, and abnormal pulmonary function study showing airflow obstruction. He attributed the COPD to cigarettes. He also diagnosed pneumoconiosis, based on abnormal x-ray, exertional dyspnea, abnormal spirometry and a history of substantial exposure to coal dust. He attributed the pneumoconiosis diagnosis to coal dust and fumes. Dr. Hawkins determined that Claimant has a moderate impairment and is unable to perform manual labor due to exertional dyspnea. He further indicated that Claimant should avoid further exposure to chemicals dust and fumes. Dr. Hawkins attributed 50% of the impairment to COPD and 50% to pneumoconiosis.

[3] No post bronchodilation test results are recorded..

[4] The height is indicated as recorded by each physician. The ALJ is required to resolve the height discrepancy contained in the record. *Protopappas v. Director*, *OWCP*, 6 BLR 1-221 (1983). An average of the reported heights produced a height of 70 inches, which is adopted.

Dr. Bradley

Dr. J. Durwood Bradley examined Claimant on September 24, 2003 and prepared a brief report captioned "New Patient Note." (E-1). The report indicates that it is "an initial History and Physical Examination for a new patient." Dr. Bradley noted that the patient worked in the coal mines from 1977 to 1999 and wanted to know if he has pneumoconiosis. Claimant indicated complaints of intermittent cough with sputum and shortness of breath which occurs while walking up steps or to the mailbox. Claimant reported that he stopped smoking two years ago. Dr. Bradley noted past medical conditions and previous diagnoses and a lengthy list of medications taken by Claimant.

Dr. Bradley indicated that an x-ray showed hyperinflation of the lungs, but no parenchymal disease. Pulmonary function studies were not successful because the effort was not consistent. Dr. Bradley diagnosed COPD, and indicated, "I see no radiographic evidence of coal workers' pneumoconiosis." He stated that Claimant was to return for an arterial blood gas study and an EKG.

Medical Records

The record contains medical record evidence of x-ray readings which were not performed specifically for the purpose of the presence or absence of coal workers' pneumoconiosis. Dr. Lanett Varnell read an x-ray on February 10, 2002 as showing a minimal degree of chronic bronchitis and COPD. (E-7). Dr. Fred Moss reviewed an October 17, 2002 x-ray as showing markedly hyperexpanded lung fields and no pneumonia. (E-10). The medical records also include an examination on July 1, 1999 by Dr. Michael Hammer for complaints of back pain. (E-13). The records also contain treatment notes from Dr. Jeffrey Hawkins dated between June 24, 2003 and August 3, 2004, which state diagnoses of COPD and coal workers' pneumoconiosis. (C-2). A list of Claimant's medications was also introduced at the hearing. (C-3).

Discussion and Conclusions of Law

To be entitled to benefits under Part 718, Claimant must establish by a preponderance of evidence that (1) he has pneumoconiosis, (2) the pneumoconiosis arose from his coal mine employment, (3) he is totally disabled, and (4) the total disability is due at least in part to pneumoconiosis. *Gee v. M.G. Moore & Sons*, 9 BLR 1-4 (1986).

Existence of Pneumoconiosis by X-ray

The applicable regulations define "pneumoconiosis" as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising from coal mine employment." § 718.201(a). This definition includes both "clinical" and "legal" pneumoconiosis. *Id.* "Legal" pneumoconiosis is broader by definition than "clinical" pneumoconiosis and includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." § 718.201(a)(2). The existence of coal workers'

pneumoconiosis may be proved by conforming x-ray evidence, biopsy or autopsy evidence, which does not exist in this case, the invocation of certain presumptions described in §§ 718.304, 718.305, or 718.306, which are not applicable in this case, and by the finding of a physician exercising sound medical judgment, based on objective medical evidence and supported by a reasoned medical opinion. § 718.202.

X-ray Evidence

Under § 718.202(a)(1), a finding of the presence of pneumoconiosis may be based upon a chest x-ray conducted and classified in accordance with § 718.102. To establish the existence of pneumoconiosis, a chest x-ray must be classified as category 1, 2, 3, A, B, or C, according to the ILO-U/C classification system. A chest x-ray classified as category 0, including subcategories 0/1, 0/0, or 0/-, does not constitute evidence of pneumoconiosis.

Claimant has not established the existence of pneumoconiosis by a preponderance of the x-ray evidence. The record contains interpretations of two x-rays, one taken on July 3, 2002 and one taken on October 17, 2002. The first film was interpreted as positive by Drs. Ballard and Ahmed and as negative by Drs. Wheeler and Scott. All four of these physicians are qualified as both B-readers and board-certified radiologists. The second film was interpreted as positive by Dr. Capiello and as negative by Drs. Wheeler and Scott. Again, all of these physicians are dually qualified. As both films were interpreted as both negative and as positive by qualified readers, I find that the x-ray evidence is in equipoise. As Claimant bears the burden to establish the existence of the disease, I am unable to find that the x-ray evidence establishes the existence of pneumoconiosis.

As no biopsy or autopsy evidence exists in the record, § 718.202(a)(2) is inapplicable in this case. Section 718.202(a)(3) provides that it shall be presumed that the miner was suffering from pneumoconiosis if the presumptions described in §§ 718.304, 718.305 or 718.306 are applicable. Section 718.304 is not applicable because there is no evidence of complicated pneumoconiosis. Section 718.305 does not apply because it pertains only to claims that were filed before January 1, 1982. Section 718.306 is only applicable to claims of miners who died on or before March 1, 1978.

Physicians Opinions

Section 718.202(a)(4) provides that a physician, exercising sound medical judgment, notwithstanding a negative x-ray, may find that the miner has pneumoconiosis. Any such finding must be based upon objective medical evidence and supported by a reasoned medical opinion. A reasoned opinion is one which contains underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co*., 10 BLR 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts and other data on which he bases his diagnosis. *Id.* Upon review of the medical opinion evidence, I find that the better-reasoned and better-documented medical reports of record establish the existence of legal pneumoconiosis.

Dr. Hawkins diagnosed pneumoconiosis after his examination based on a positive x-ray, exertional dyspnea, abnormal spirometry and dust exposure. While I have determined that Claimant has not established pneumoconiosis by x-ray evidence, this determination is admittedly a close call, as there are both positive and negative readings by qualified readers. In addition, the film relied on by Dr. Hawkins was read as positive by Dr. Ballard, who is dually qualified. Accordingly, I find that the fact that the x-ray evidence does not establish pneumoconiosis does not lessen the persuasiveness of Dr. Hawkins' determinations. Moreover, Dr. Hawkins' opinion was based on additional evidence beyond the x-ray evidence. Therefore, I find his report is adequately documented and reasoned and entitled to probative weight on this issue.

On the other hand, Dr. Bradley did not diagnose pneumoconiosis. While he diagnosed chronic obstructive pulmonary disease, he did not attribute the condition to coal mine employment. I find Dr. Bradley's report on this issue less persuasive, as the only reference to the presence or absence of pneumoconiosis is that "I see no radiographic evidence of pneumoconiosis." While the lack of x-ray evidence may be a factor to support a determination that no pneumoconiosis is present, Dr. Bradley does not explain his statement any further and it is unclear if he simply equated the lack of x-ray evidence with the absence of the disease. Accordingly, I find his determination is not fully reasoned and is entitled to less weight.

After considering the two medical opinions on this issue, I find that Dr. Hawkins' report outweighs the contrary report of Dr. Bradley on this issue and that Claimant has established pneumoconiosis by medical opinion evidence.

Relationship of Pneumoconiosis to Coal Mine Employment

If a miner has pneumoconiosis and was employed in coal mines for ten years or more, he is entitled pursuant to § 718.203(b) to invoke a rebuttable presumption that the pneumoconiosis was caused by the coal mining employment. In the present case, Claimant's Social Security Earnings records, Claimant's deposition testimony, and Claimant's testimony at the formal hearing all establish a history of employment in coal mines of slightly over 10 years, which allows him to invoke the rebuttable presumption that his pneumoconiosis arose from his coal mining employment. No evidence has been presented to rebut this presumption and I therefore find that Claimant has established that his pneumoconiosis arose from coal mine employment.

Total Disability

In addition to the existence of pneumoconiosis Claimant must establish total disability due to pneumoconiosis in order to establish entitlement to benefits. Total disability is defined as the miner's inability, due to a pulmonary or respiratory impairment, to perform his usual coal mine work or to engage in comparable gainful work in the vicinity of the miner's residence. § 718.204(b)(1)(i) and (ii). Total disability can be established pursuant to one of the four standards in § 718.204(b)(2) or pursuant to the irrebuttable presumption of § 718.304, which is incorporated into § 718.204(b)(1). The presumption under § 718.304 is not invoked in this case because there is no evidence of complicated pneumoconiosis.

Section 718.204(b)(2)(i) provides for a finding of total disability where a pulmonary function test produces values less than or equal to the values specified in the Appendix B to Part 718. This claim contains the results of one pulmonary function study, taken on July 3, 2002. The results of the sole pulmonary function study produced results that are qualifying under the Act's standards and the test results were validated by a consultant for DOL. Therefore, I find that the pulmonary function study evidence establishes total disability.

Section 718.204(b)(2)(ii) provides for proof of total disability by arterial blood gas tests. Blood gas tests may establish total disability where the results demonstrate a disproportionate ratio of pCO_2 to pO_2, which indicates the presence of a totally disabling impairment in the transfer of oxygen from the Claimant's lung alveoli to his blood. § 718.204(b)(2)(ii) and Appendix C. The test results must equal or be less than the table values set forth in Appendix C to Part 718. In the present case, Claimant underwent arterial blood gas tests on two occasions. Both arterial blood gas studies failed to produce qualifying results. Therefore, Claimant has not established total disability by arterial blood gas studies.

The record contains no evidence that Claimant has cor pulmonale with right-sided congestive heart failure and Claimant has not established total disability in this manner.

If total disability cannot be established under § 718.204(b)(2)(i), (b)(2)(ii) or (b)(iii), § 718.204(b)(2)(iv) provides that total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents the miner from engaging in his usual coal mine work or comparable gainful work. The medical opinion evidence of record is deemed to support a finding of total disability.

A medical opinion that is unreasoned and undocumented may be given little or no weight. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc). A "documented" opinion is one that sets forth the clinical findings, observations, facts, and other data that the physician relied on for his diagnosis. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). A "reasoned" opinion is one where the administrative law judge finds underlying documentation and data adequate to support the physician's conclusions. *Id.* However, an opinion which recommends against further coal mine exposure because of a pulmonary disease or condition is not, as a matter of law, a finding of inability to do the work or of disability attributable to that disease. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *White v. New White Coal Co*., 23 BLR 1-1 (2004); *Taylor v. Evans & Gambrel Co., Inc*., 12 BLR 1-83 (1988).

Dr. Hawkins determined that Claimant has a moderate impairment and is unable to perform manual labor due to his exertional dyspnea. I find his opinion on this issue is well-reasoned and supported by the medical evidence of record. Dr. Bradley, the only other physician to prepare a report in this claim did not comment on the level of Claimant's impairment, and I therefore do not find his report probative on this issue.

Considering all of the evidence of total disability, I find that Claimant has established that he is totally disabled from a respiratory standpoint by the qualifying pulmonary function study and medical opinion evidence.

Total Disability Due to Pneumoconiosis

Finally, to establish entitlement to benefits, the Claimant must establish that total disability is due to pneumoconiosis pursuant to § 718.204(c)(1). Proof of total disability due to pneumoconiosis requires that pneumoconiosis, as defined in § 718.201, be a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Substantially contributing cause is defined as having a "material adverse effect on the miner's respiratory or pulmonary condition" or as a factor that "materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." § 718.204(c)(1). No evidence of cor pulmonale or evidence which would invoke the presumptions of §718.305 has been offered. Therefore, § 718.204(c)(1) requires that total disability due to pneumoconiosis be established by means of a physician's documented and reasoned medical opinion in this case.

Dr. Hawkins attributed 50% of Claimant's disability to pneumoconiosis and 50% to smoking in a reasoned and documented opinion. Dr. Bradley did not diagnose pneumoconiosis, nor did he comment on the level of Claimant's disability. Therefore, I find that Claimant has established that pneumoconiosis is a substantially contributing cause of his total disability.

Entitlement

The evidence submitted in this claim establishes that Claimant has pneumoconiosis arising from his coal mine employment and total disability arising therefrom. Consequently, Claimant is entitled to benefits under the Act.

Date of Entitlement

Section 725.503 provides that benefits are payable to a miner who is entitled beginning with the month of the onset of total disability due to pneumoconiosis. Where the evidence does not establish the month of onset, benefits are payable to the miner beginning with the month during which the claim was filed. Since the record in this case does not contain any medical evidence establishing exactly when the Claimant became totally disabled, payment of benefits should commence as of April 1, 2002, the month and year in which the Claimant filed this claim for benefits.

Attorney's Fees

Claimant's counsel is allowed thirty days within which to submit an application for an attorney's fee for service to the Claimant. The application must conform to §§ 725.365 and 725.366. The application must be accompanied by a service sheet showing that service has been made upon all parties, including the Claimant and Solicitor as counsel for the Director. Parties so served shall have tem days following receipt of any such application within which to file their

objections. Counsel is forbidden by law to charge the Claimant any fee in the absence of the approval of such application.

ORDER

The claim of William R. Duke for benefits under the Act is granted. Cowin & Company, Inc. shall pay to the Claimant such benefits to which he is entitled, commencing as of April 1, 2002.

A

Edward Terhune Miller
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes